In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
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OCTOBER TERM, 1940

No. 576

CLARENCE DEVEUVE, doing business under the firm name and style of San Francisco Underwriters of San Francisco, THE TEXAS NATIONAL INSURANCE COMPANY OF DOVER, DELAWARE (a corporation), and THE SECURITY NATIONAL FIRE INSURANCE COMPANY OF GALVESTON, TEXAS (a corporation),

Petitioners and Appellees,

vs.

IDA LOUISE TARLETON and MARY ANN MCELLIGOTT,

Respondents and Appellants.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit, and BRIEF IN SUPPORT THEREOF.

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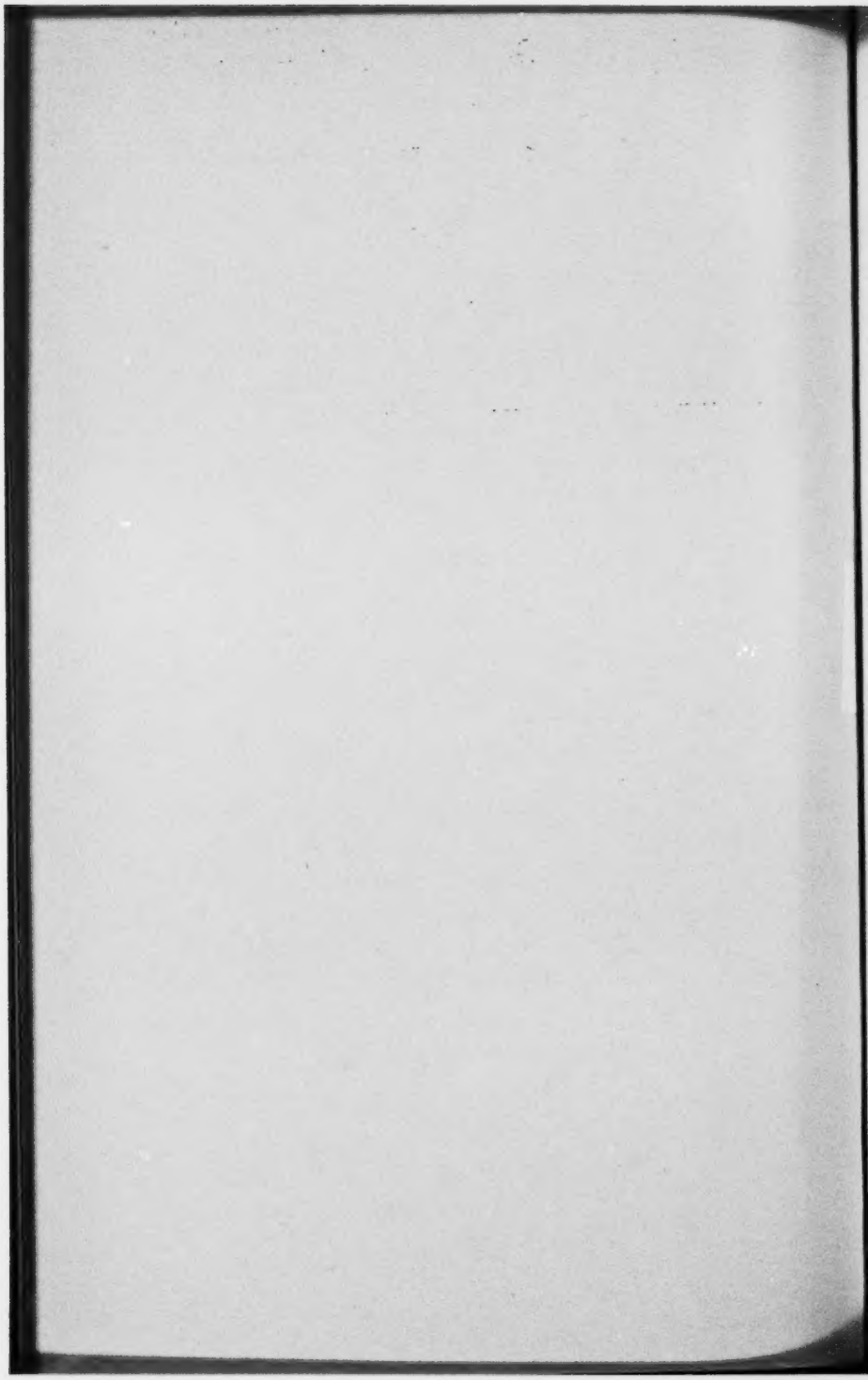

Subject Index

Page

Petition for Writ of Certiorari..... 1

Summary Statement of Matters Involved..... 2

A.

History of the case..... 2

B.

Facts concerning issuance of insurance policy sued upon.... 4

C.

Statement of the pleadings..... 7

D.

Question in trial court..... 8

Taking of appeal 9

E.

The principal questions involved on said appeal..... 9

Basis of Application for Writ of Certiorari..... 11

It is Respectfully Submitted That There Are Three Governing Considerations for Not Leaving Undisturbed the Judgment of the Circuit Court of Appeals for the Ninth Circuit 15

Reasons for Granting Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit..... 15

Questions Presented 19

Brief in Support of Petition for Writ of Certiorari..... 21

I.

Opinions of the courts below..... 21

II.

Jurisdiction 22

Facts showing that the nature of the case and the rulings below were such as to bring the case within the jurisdictional limits relied upon..... 23

III.

Statement of the case..... 27

IV.

Specification of errors 27

Point A. The finding of the United States District Court for the Northern District of California, Northern Division

Page

thereof, are supported by the evidence and should not be set aside because they are not "clearly erroneous", and due credit should be given to the opportunity of the trial court to judge the credibility of witnesses..... 28

Point B 33

Point C. The decision of the United States Circuit Court of Appeals for the Ninth Circuit reversing the judgment of the trial court (U. S. District Court for Northern California, Northern Division thereof) is in conflict with the decisions of its own circuit, other United States Circuit Courts of Appeals and the Supreme Court of the United States on the same subject..... 34

Point D. The plaintiffs and appellants have not sustained the burden of proof required under California law and the judgment of the Circuit Court of Appeals for the Ninth Circuit reversing the trial court failed to interpret and failed to apply the rule of Cities Service Oil Co. v. Dunlap, 308 U. S. 208, and failed to follow the California law as to the presumptions and burdens of proof..... 40

Point E. The United States Circuit Court of Appeals did not interpret and did not apply the rule in Ferrar v. West Assurance Corporation, 30 Cal. App. 489, to the facts in the case at bar..... 65

Point F. What is the scope of review of the findings of fact and conclusions of law of the trial United States District Court by the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the provisions of Rule 52 of the Rules of Procedure for the United States Circuit Court adopted by the Supreme Court of the United States 72

The Background for Proper Review..... 77

Our History Indicates That the Right of Appeal Should Be Restricted 78

An Extension of the Scope of Review Is Not Desirable..... 78

Conclusion 80

Table of Authorities Cited

Cases

Pages

Anglo-California National Bank v. Lazard, 106 F. (2d) 693, C. C. A. 9th, 1939 ..... 16, 35, 37, 39, 76

Bradford Electric Light Co. v. Clapper, 284 U. S. 221, 76 L. ed. 254, 52 S. Ct. 118 22

Cities Service Oil Co. v. Dunlap, 308 U. S. 208, 60 Sup. Ct. 201, 84 L. Ed. 196 ..... 14, 18, 19, 26, 27, 81

Crowell v. Baker Oil Tools Inc., 99 F. (2d) 524, C. C. A. 9th, 1938 39

Erie v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 ..... 14, 18, 19, 26, 27, 69, 81

Equitable Life Insurance Society v. McElroy, 83 F. Rep. 631, 49 U. S. App. 548, 28 C. C. A. 365 32

Ferrar v. Western Assurance Corporation, 30 Cal. App. 489 ..... 14, 16, 17, 19, 26, 27, 65, 68, 69

First National Bank of Chicago v. United States, 102 F. (2d) 907 (C. C. A. 7th, 1939), certiorari denied, 307 U. S. 641 (1939), rehearing denied, 60 Sup. Ct. 69 (1939) 77

Fritch, J. Home, Inc. v. United States, 248 U. S. 458 (1919) 76

Guilford Construction Company v. Biggs, 102 F. (2d) 46.. 36

Helvering v. Johnson, 104 F. (2d) 140 (C. C. A. 8th, 1939) 77

Kooistra v. Rockford Insurance Company, ... Mich. ....., 81 N. W. 568 ..... 67, 68, 69

Laumann v. Springfield Fire Insurance Company, 184 Cal. App. 650 ..... 69, 70, 71

Lawrence v. Goodwill, 44 Cal. App. 440 42

Lee Hardware Co. v. United States, 25 F. (2d) 42 (C. C. A. 8th, 1928) 76

Luziar's Inc. v. Nee, 106 F. (2d) 130, C. C. A. 8th, 1939 ... 16, 38

Malloy v. New York Life Insurance Company, 103 F. (2d) 439 37

Pages

Manning v. Gagne, 108 F. (2d) 718, C. C. A. 1, 1939.....16, 37
McDaniel v. United States, 108 F. (2d) 450, C. C. A. 7th, 1939 .....16, 39
McKeever v. Fontenot, 104 F. (2d) 326, C. C. A. 5th, 1939 .....16, 38

Occidental Life Insurance Co. v. Thomas, 107 F. (2d) 876 .....16, 35, 37, 39, 53

Pennsylvania Railroad Co. v. S. Chamberlain, 228 U. S. 333 .....26, 81

Slaker v. O'Connor, 278 U. S. 188, 73 L. ed. 258, 49 S. Ct. 158 22
Stevenson v. Southern Insurance Office, 17 Cal. App. 280.. 68
Stonega Coke and Coal Company v. Price, 102 F. (2d) 411 36
Storley v. Armour & Company, 107 F. (2d) 499, C. C. A. 8th, 1939 .....16, 38
Sundt v. Turman Oil Company, F. (2d) 762, C. C. A. 5th, 1939 38

Union Central Life Insurance Company v. Pauloy, 8 Ind. App. 85, 35 N. E. Rep. 190..... 32
United States v. Appalachian Power Company, 107 F. (2d) 769 36

Wessel v. United States, 49 F. (2d) 137 (C. C. A. 8th, 1931) 76

Statutes and Codes

California Code of Civil Procedure:
Section 1869 .....26, 27, 40, 41
Section 1981 .....26, 27, 40, 41
Section 2061 (5) 26, 27, 41

28 U. S. C. A. 346, 347..... 22
2 U. S. C., Sec. 773..... 72
26 U. S. C. 641C (1934)..... 77

Act of May 22, 1938, amending 28 U. S. C. 288b..... 76

Rules

Pages

Rules of Procedure of the United States District Court:
Rule 43 32
Rule 52 .....13, 20, 27, 28, 36, 38, 53, 56, 60, 72, 74, 75, 76, 77
Rules 52 (a), (b)...9, 10, 11, 12, 14, 15, 17, 18, 24, 25, 26,33, 39
Rules of the Supreme Court, Rule 38..... 2

Proposed Rules of the Supreme Court:
Rule 59, Report of the Advisory Committee, 1937..... 74
Rule 65, preliminary draft, 1936.....73, 74
Rule 68, preliminary draft, 1936.....73, 74

Texts

Clarke & Stone, Review of Findings of Fact (1937), 484
Chi. U. L. Rev. 190.....73, 74

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No.

CLARENCE DEVEUVE, doing business under the firm name and style of San Francisco Underwriters of San Francisco, THE TEXAS NATIONAL INSURANCE COMPANY OF DOVER, DELAWARE (a corporation), and THE SECURITY NATIONAL FIRE INSURANCE COMPANY OF GALVESTON, TEXAS (a corporation),

Petitioners and Appellees,

vs.

IDA LOUISE TARLETON and MARY ANN MCELLIGOTT,

Respondents and Appellants.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, the appellee, Texas National Fire Insurance Company of Dover, Deleware, a Delaware corporation, and appellee, Security National Fire Insurance Company of Galveston, Texas, a Texas corporation, both authorized to do business in the State of California, under the firm name of San Francisco Underwriters, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment entered by that Court on July 3, 1940 (113 F. (2d) 290), reversing the judgment of the United States District Court for the Northern District of California, Northern Division (unreported).

A petition for rehearing was filed on August 2, 1940, and within the time permitted by rule of the Court, and denied by memorandum order of the Court on September 11, 1940.

In conformity with Rule 38 of this Court a certified copy of the record, including the proceedings in the Ninth Circuit Court of Appeals, accompanies this petition.

SUMMARY STATEMENT OF MATTERS INVOLVED.

A.

HISTORY OF THE CASE.

The complaint was filed in the Superior Court of the State of California in and for the County of

Sacramento by respondent and appellant, Mary Ann McElligott, and respondent and appellant, Ida Louise Tarleton, both residents and citizens of the State of California, for the purpose of recovering from the appellee and petitioner, Texas National Insurance Company, of Dover, Delaware, a Delaware corporation, and appellee and petitioner, Security National Fire Insurance Company of Galveston, Texas, a Texas corporation, both authorized to do a fire insurance business in the State of California under the name "San Francisco Underwriters", to recover the sum of $5000 on California Standard form fire insurance policy with Standard form mortgage clause attached, issued in the name of San Francisco Underwriters on or about March 5, 1936, of which sum, $4000 covered the buildings located on the property described in the insurance policy situated about eight miles north of Sacramento, and payable in the event of loss to appellant and respondent, Ida Louise Tarleton, mortgagee, and $1000 covered the personal property, not covered by the mortgage, payable to Mary Ann McElligott, appellant and respondent, owner of the premises described in the insurance policy. Because of diversity of citizenship, the case was removed upon petition of the appellees and petitioners to the District Court of the United States, for Northern California, Northern Division thereof, at Sacramento.

B.

FACTS CONCERNING ISSUANCE OF INSURANCE POLICY SUED UPON.

Appellant and respondent, Mary Ann McElligott, owned the property described in the insurance policy and located about eight miles north of Sacramento, California. The property was mortgaged to Ida Louise Tarleton, appellant and respondent, for $4000. In August, 1935, appellant and respondent, Mary Ann McElligott, requested W. G. McGlone—a Sacramento agent for the Lumberman's Underwriting Alliance—to insure the buildings in the Lumbermen's Insurance Company for $4000 with loss payable to Ida Louise Tarleton, mortgagee, and personal property for $1000 with loss payable to Mary Ann McElligott. The policy was to run for three years at an agreed premium of $150—all of which was approved by Mary Ann McElligott prior to issuance of the policy (Record, page 97). Ida Louise Tarleton knew nothing about this or any other policy of insurance. (Record, page 169.) Mary Ann McElligott paid $20, when the policy was issued, and $20 about December 20th (Record, page 98) and McGlone returned the policy to the company for cancelation. Ida Louise Tarleton had no notice of this cancellation. (Record, page 106.)

McGlone made several attempts to secure other insurance in the Kansas City Fire & Marine Insurance Company and The Commerce Fire Insurance Company, and these were likewise canceled by McGlone without knowledge or consent of appellant and respondent Mrs. Tarleton and appellant and respondent

Mrs. McElligott. He then asked Hubbs, special agent for the Lumberman's Underwriters Alliance to secure insurance for $5000, $4000 on the buildings, loss payable to Ida Louise Tarleton, and $1000 on personal property, loss payable to Mary Ann McElligott. *Nothing was said about the amount of the premium.* Hubbs said he could not place it in his company but he would secure it elsewhere. No one knew what company it was to be placed in and no mention was made of any particular company. San Francisco Underwriters was unknown to McGlone, McElligott or Tarleton. A general insurance broker, J. D. Richards, of San Francisco, contacted the San Francisco Underwriters; they issued the policy for $5000—loss payable to Ida Louise Tarleton in the sum of $4000 and $1000 payable to Mary Ann McElligott—for three years—for $200 premium—an increase of $50 over the other premium.

Neither McGlone, Tarleton, nor McElligott ever agreed to pay a premium of $200 for this policy, either before or after issuance. The policy was sent to Ulvilla of the Lumberman's Underwriters Alliance who in turn sent it to McGlone in Sacramento. It was dated March 5, 1936, and remained in McGlone's possession until May 2, 1936, during which time he attempted to but could not contact Mrs. McElligott because he was told she was ill. (Record, pages 113, 129.) After Ulvilla sent the policy to McGlone, he dunned McGlone for the payment of the premium (Record, page 210) and on May 2, 1936, McGlone returned the policy to Ulvilla, accompanied by a letter

dated May 2, 1936 (Ex. A, Record, page 115), requesting that it be canceled because insured could not pay the premium. (Record, page 115.) Previously McGlone had requested the insurance company to cancel the policy flat, i. e., without liability for the payment of premium. (Record, page 144.)

The policy sued upon was never in possession of Mrs. McElligott (Record, page 187) or Mrs. Tarleton. (Record, page 167.) McGlone kept it in his possession from the time he received it, shortly after March 5th, to May 2, 1936 (Record, page 113) and during that time, he attempted to see Mrs. McElligott; went to her place of business several times but was told she was ill (Record, page 113) and he was unable to see her and did not at any time after March 5, 1936, demand payment of the premium from Mrs. McElligott (Record, page 113) or from Mrs. Tarleton. (Record, page 116.)

The outstanding fact to be considered as far as validity or existence of the policy is concerned, is that the existence of the policy was not known to Mrs. McElligott or Mrs. Tarleton. McGlone kept the policy in his possession and made no effort to contact Mrs. Tarleton although her address appeared after her name in the mortgage clause. He attempted to but could not contact Mrs. McElligott and when he could not do so, he returned the policy through the same channels through which it was received and was canceled flat by the insurance company upon request of McGlone.

C.

STATEMENT OF THE PLEADINGS.

The complaint is in the usual form of an action predicated on a policy of fire insurance with standard mortgagee clause attached thereto.

The appellees and the defendants answered jointly and denied that the policy and the mortgage clause had ever been in full force or effect and on information and belief denied substantially all of the allegations of the complaint and in addition thereto, set forth six special defenses in their answer.

First Defense (Record, page 50):

> Premium on the policy should be paid sixty days after issuance and if not so paid, the policy must be surrendered and canceled. The payment of premium was not made within 60 days from the date of issuance, the appellant surrendered policy for cancelation and the appellees canceled the same, prior to the destruction by fire of the property insured.

Second Defense (Record, page 52):

> McGlone and Richards were the agents and servants of McElligott and Tarleton acting within the scope of their employment, and as such surrendered the policy for cancelation to the appellees and the policy was canceled by appellees at the request of the insured prior to loss.

Third Defense (Record, page 53):

> McGlone and Richards, at the request of McElligott and Tarleton, advised defendants that plaintiffs rescinded and canceled the contract of

insurance and canceled the policy flat so as to relieve them from any liability for payment of premium.

FOURTH DEFENSE (Record, page 55):

The policy was canceled at the request of the insured.

FIFTH DEFENSE (Record, page 55):

The policy was void by reason of false misrepresentation and swearing contrary to its terms.

SIXTH DEFENSE (Record, page 57):

The premium on the policy was payable on demand, that demand was made and the premium was not paid, the policy was surrendered by McElligott and Tarleton to the insurance companies and canceled prior to loss.

D.

QUESTION IN TRIAL COURT.

(1) Was the policy ever in effect

(2) If policy was ever in effect, was it ever canceled in accordance with its provisions as to cancelation or in accordance with mutual agreement of the parties or in accordance with law?

The complaint was filed in the Superior Court of Sacramento County, February 17, 1937, removed to United States District Court at Sacramento, April 27, 1937, trial was held by the Court without a jury on December 13th and 14, 1938. A judgment was rendered against the plaintiffs and in favor of the insur-

ance companies on March 28, 1939. The trial Court found as a fact that the fire insurance policy sued upon was never delivered to or accepted by either of the plaintiffs or by anyone acting on their behalf and that the fire insurance policy was not in effect on the date of the loss, May 21, 1936.

TAKING OF APPEAL.

The appeal from said judgment was taken by the plaintiff Ida Louise Tarleton and the plaintiff, Mary Ann McElligott, to the Circuit Court of Appeals for the Ninth Circuit, which reversed the judgment of the trial Court and decided that the policy was in effect from the date of its issuance, March 5, 1936, and that on the date of the claimed fire loss that it had not been canceled pursuant to the provisions thereof respecting cancelation or pursuant to agreement of the parties or in accordance with law, and, therefore, both of the plaintiffs were entitled to recover under the terms of the policy.

E.

THE PRINCIPAL QUESTIONS INVOLVED ON SAID APPEAL WERE:

The interpretation, construction and application of Rule 52 (a) and (b) of Civil Procedure for the District Courts of the United States, as applied to the findings of fact and conclusions of law of the trial Court (United States District Court), whether or not

the findings of the trial Court were supported by the evidence and should not be set aside unless "clearly erroneous", due regard being given to the opportunity of the trial Court to judge of the credibility of the witnesses.

The Circuit Court of Appeals in its opinion (Record, page 263) 113 F. (2d) 290-4 (bottom thereof) states: "Questions before this Court are (1) whether the insurance policy was ever in effect; (2) if so, whether it was incumbent upon appellees, as required in the mortgage clause attached to and made a part of the policy, to have given Mrs. Tarleton, the mortgagee, notice before cancelation; (3) whether the action of McGlone, in returning to appellees the policy accompanied by the request to cancel it, sufficed to deprive Mrs. McElligott of any rights thereunder.

The Court, in its opinion, does not apply, does not interpret and does not make any reference whatever to Rule 52 Subdivisions (a) and (b) thereof, nor does it indicate in any manner, except inferentially from the language of its opinion, whether its decision reversing the trial Court was influenced by the provisions of Section (a) of Rule 52, which, as we have pointed out before, provides among other things, that the findings shall stand unless clearly erroneous, or whether they were guided in their judgment or decision reversing the trial Court by the provisions of Subdivision (b) which provides among other things that when findings of facts are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may be

raised on appeal whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend them or a motion for judgment.

There is no question but that the proof conclusively showed that the policy sued upon did not, in fact, ever come into effect. The trial judge who saw the witnesses and heard the evidence so found. (See Findings, printed Record, pages 67 to 69, inclusive.)

BASIS OF APPLICATION FOR WRIT OF CERTIORARI.

The trial Court found as a fact that the policy of insurance sued upon was never delivered to or accepted by the plaintiff, Ida Louise Tarleton or by the plaintiff, Mary Ann McElligott, or by any one acting for or on behalf of them or either of them, and the policy therefore was not in effect at any time and particularly on May 21, 1936, the date upon which the fire loss occurred. (Record, pages 67-8.)

Rule 52 of the Rules of Procedure of the District Courts of the United States, Subdivision (a) provides among other things that in all actions tried upon the facts without a jury, findings of fact should not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses. Subdivision (b) of the same rule provides that when findings of fact are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support

the findings may thereafter be raised, whether or not the party raising the questions has made in the District Court an objection to such findings or has made a motion to amend them or a motion for a judgment.

The Circuit Court of Appeals for the Ninth Circuit reversed the judgment and set aside findings of fact and conclusions of law of the trial Court without interpreting and without applying Rule 52, Subdivisions (a) and (b) thereof, hereinabove referred to, with respect to the said findings of fact and conclusions of law, but on the other hand, undertook to analyze the evidence and to draw its own conclusions therefrom without any reference in its opinion to the interpretation or application of Rule 52, Subdivisions (a) or (b), stated in its opinion 113 F. (2d) 290, at bottom of page 294 (Record, page 263); the questions before the Court were:

1. Whether or not the policy was in effect.

2. If it was in effect, was it incumbent upon the insurance companies, in accordance with the provisions of the insurance policy and the standard mortgage clause attached, to notify Ida Louise Tarleton, the mortgagee, of cancelation in order to make the cancelation effective as to her.

3. Whether the act of McGlone, an insurance broker who procured the policy, in returning the policy to the insurance company stating that the policy was returned for cancelation because the insured was unable to meet the premium at that time, operated as a cancelation of the policy in so far as Mrs. McElligott is concerned.

It is respectfully submitted that none of these three questions were before the Circuit Court of Appeals. On the other hand, the only question before the Circuit Court of Appeals was whether or not in accordance with the provisions of Rule 52, hereinabove referred to, the findings of fact of the trial Court were clearly erroneous, due regard being given to the opportunity of the trial Court to judge of the credibility of the witnesses, and should be set aside or whether on the other hand, they were supported by the evidence and should stand.

This case presents clearly the important, unsettled and troublesome question as to the scope of review of the findings of the District Court of the United States (trial Court in this case) by the United States Circuit Court of Appeals for the Ninth Circuit (the Appellate Court in this case) pursuant to the provisions of the Rule 52 hereinabove referred to. The decision of the Circuit Court of Appeals for the Ninth Circuit emphasizes the great importance to the legal profession and to the Courts of the meaning, construction and interpretation of Rule 52, and demonstrates the need of an authoritative and elucidating decision by the United States Supreme Court as to the scope of review permitted or required by the Appellate Court of the findings of the trial Court, a question which has never been determined by the decisions of the Supreme Court of the United States.

The effect of a judgment of the Circuit Court of Appeals for the Ninth Circuit reversing the United States District Court is to undermine generally and

to disregard in its entirety the provisions of Rules 52(a) and 52(b) and to create a new rule of its own to the effect that the Appellate Court has a right to weigh the evidence and to draw its own inferences therefrom opposite from those of the trial Court even though the findings of the trial Court are supported by the evidence and are not clearly erroneous, due regard being given to the trial Court to judge of the credibility of the witnesses as shown by their conduct on the stand, the character of their evidence, their manner, relation to the parties, bias and prejudice, degree of intelligence, reasonableness or unreasonableness of their answers and the strength or weakness of their recollection.

There is also involved the important question of the application of the rule in *Erie v. Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, inasmuch as the Circuit Court of Appeals for the Ninth Circuit has failed to interpret and to apply the rule to *Ferrar v. Western Assurance Corporation,* 30 Cal. App. 489, in so far as it affects the interest of Mary Ann McElligott, owner, under the policy and claimed beneficiary thereunder to the extent of $1000 insurance on personal property not covered by the mortgage.

There is also involved the important question of the application of the rule of *Cities Service Oil Co. v. Dunlap,* 308 U. S. 208, 60 Sup. Ct. 201, 84 L. Ed. 196, inasmuch as the Circuit Court of Appeals for the Ninth Circuit has failed to interpret and failed to apply the rule in so far as it applies to the State precedents of California on presumptions and burden of proof.

IT IS RESPECTFULLY SUBMITTED THAT THERE ARE THREE GOVERNING CONSIDERATIONS FOR NOT LEAVING UNDISTURBED THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

I. The Supreme Court should intervene to quiet a conflict in decisions between the various United States Circuit Courts of Appeal with respect to the meaning, interpretation and construction of Rule 52 (a) and (b) of the Rules of Procedure for the District Courts of the United States, which it alone can compose;

II. To declare the law with respect to the scope of review under Rule 52 because the intrinsic importance of the issue calls for the most authoritative determination of the United States Supreme Court.

III. To correctly interpret and apply the decisions of the United States Supreme Court to the facts in the case at bar.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

A.

The decision of the Circuit Court of Appeals for the Ninth Circuit reversing the decision of the United States District Court for the Northern District of California, Northern Division thereof, and setting aside the findings of fact and conclusions of law of the trial Court is in conflict with decisions of its own Court, of the Circuit Courts of Appeal of the United States for the various circuits hereinafter mentioned,

on the same matter, in the following cases hereinafter cited.

First Circuit:

Manning v. Gagne, 108 F. (2d) 718, C. C. A. 1, 1939.

Eighth Circuit:

Luziar's Inc. v. Nee, 106 F. (2d) 130, C. C. A. 8th, 1939;

Storley v. Armour & Company, 107 F. (2d) 499, C. C. A. 8th, 1939.

(The decisions of the Fifth and Seventh Circuits are equivocal and are in conflict with the decision in the case at bar.)

Fifth Circuit:

McKeever v. Fontenot, 104 F. (2d) 326, C. C. A. 5th, 1939;

Seventh Circuit:

McDaniel v. United States, 108 F. (2d) 450, C. C. A. 7th, 1939;

Ninth Circuit:

Anglo-California National Bank v. Lazard, 106 F. (2d) 693;

Occidental Life Insurance Company v. Thomas, 107 F. (2d) 876.

B.

The decision of the Circuit Court of Appeals for the Ninth Circuit overruling, failing to interpret and failing to apply *Ferrar v. Western Assurance Corporation,* 30 Cal. App. 489, which holds that a broker

who acted as agent for the insured for the purpose of securing insurance had no authority to cancel insurance, is a decision on an important question of local law in a way probably in conflict with applicable local decisions. The United States Circuit Court of Appeals for the Ninth Circuit has herein announced a rule potentially governing a substantial number of other cases which is in conflict with the rule announced in the authoritative state Court decision of *Ferrar v. Western Assurance Corporation,* supra.

C.

The decision of the Circuit Court of Appeals for the Ninth Circuit reversing the judgment of the trial United States District Court setting aside the findings of fact and the conclusions of law of the trial Court, by holding that the policy of insurance sued upon was in full force and effect on March 5, 1936, to and including the date of the loss on May 21, 1936, and that it had never been canceled as to the owner, Mary Ann McElligott, or as to the mortgagee, Ida Louise Tarleton, involves an important question of federal law, to-wit: the scope of review permitted to or required by a United States Appellate Court under the provisions of Rule 52, subdivisions (a) and (b) thereof of the Rules of Procedure for the District Court which has not been but should be settled by this Court.

D.

The Circuit Court of Appeals in this decision has failed to apply and has plainly misinterpreted the

provisions of Rule 52, subdivisions (a) and (b) thereof, of the Rules of Procedure of the District Court of the United States adopted by the Supreme Court of the United States and the elucidation of its own rules, is an indispensable aspect of the function of the Supreme Court of the United States.

E.

The United States Circuit Court of Appeals for the Ninth Circuit has plainly failed to interpret and has failed to apply the law set down in the following cases:

Erie v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817;

Cities Service Oil Co. v. Dunlap (1939), 308 U. S. 208, 84 L. Ed. 196, 60 Sup. Ct. 201.

The elucidation of these decisions as applied to the facts in the case at bar is a matter of public importance.

F.

The great importance to the legal profession and to the Courts of the meaning, construction and interpretation of the Rule 52 involved in the case at bar, the need of an authoritative and an elucidating decision by the United States Supreme Court as to the scope of review permitted or required by the United States Circuit Court of Appeals for the Ninth Circuit of the findings of fact and conclusions of law made by the United States trial Courts.

QUESTIONS PRESENTED.

Upon the facts there is presented a situation wherein a fire insurance company, without a formal written application for a policy of insurance by either owner or mortgagee, issues a policy by virtue of which it offers to insure for $5000, for 3 years, for $200 premium, property described in the policy, with loss payable to mortgagee in the sum of $4000 and the owner the sum of $1000 and gives it to a broker who in turn mails it to another broker, representing the owner, who keeps it in his possession from shortly after date, March 5, 1936, to May 2, 1936, and during which time he does not contact the mortgagee or the owner and advise them of its receipt or the amount of premium and upon request, after demand is made for payment of the premium, returns the policy through the same channels through which it was received, together with a letter stating that it is returned for cancelation because insured cannot pay the premium on account of illness. (Record, page 115.)

QUERY 1. Did the United States Circuit Court of Appeals, 9th Circuit, follow the doctrine of the *Cities Service Oil Co. v. Dunlap,* 308 U. S. 208, in interpreting and applying the California law as to presumptions and burden of proof?

QUERY 2. Did the United States Circuit Court of Appeals, 9th Circuit, follow the doctrine of *Erie v. Tompkins,* 304 U. S. 64, in interpreting and applying the decision in *Ferrar v. Western Assurance Corporation,* 30 Cal. App. 489?

QUERY 3. What is the scope of review by an Appellate Court of the findings of fact of the trial Court

under Rule 52 of the Rules of Procedure for the United States District Court?

QUERY 4. Was there an application for an insurance policy and was it accepted?

QUERY 5. Was there an offer to insure and was it accepted?

QUERY 6. Was there a delivery of the policy?

QUERY 7. If the policy was in effect, was it canceled in accordance with the terms or by mutual consent of the parties?

Wherefore your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in these causes, to the end that the same may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed by the Court, and for such further relief as may seem just and proper.

Dated, Sacramento, California,
November 8, 1940.

Respectfully submitted,
WALLACE SHEPARD,
Counsel for Petitioners.

FRANK L. MURPHY,
Of Counsel.